UNITED STATES V. HILTON

By Brenda M. Simon

The Exorcist, Taxi Driver, Midnight Cowboy, and *Lolita* arguably could be included on a list of the best, and most controversial, movies ever made. But it would also be a list of movies that could be prohibited by the Child Pornography Prevention Act of 1996 ("CPPA").[1] In the most recent film, *Lolita*, fifteen-year-old Dominique Swain plays a twelve-year-old girl involved in an obsessive, sexual relationship with a forty-five-year-old man.[2] Though the director used a nineteen-year-old body double for nude shots and a cushion was placed between Swain and co-star Jeremy Irons whenever physical contact occurred, American film distributors refused to release "Lolita" in the United States.[3]

With the spread of the "Lolita syndrome," in which advertisers and photographers have been accused of selling children as sexual objects, tough new child pornography laws have surfaced that affect more than the making of movies.[4] Since JonBenet Ramsey, age six, was sexually attacked and murdered in Colorado, producers of children's beauty pageants have been censured for transforming children into "sex puppets."[5] The State of Alabama has charged Barnes & Noble, one of the country's largest chains of booksellers, with obscenity because it sells art books by two photographers showing naked children.[6] Contributing to the anxiety, exposure of an international child pornography ring and increasing pornogra-

1. 18 U.S.C. § 2252A (1998).

2. *See* Bob Van Voris, *Coming Soon: 'Lolita,' the Lawyer's Cut, A First Amendment Lawyer Played Censor to the Classic,* NAT'L L.J., Aug. 17, 1998, at A1. Previously, *Lolita* was published as a novel by Vladimir Nabokov in 1955 and released as a film adaptation by Stanley Kubrick in 1962. *See id.*

3. *See id.* Note, however, that the film was later made available for viewing through cable television and the home video market.

4. *See* Matthew Campbell, *US Moral Majority Freezes Out Lolita,* SUNDAY TIMES (London), Mar. 29, 1998, *available in* 1998 WL 11119099.

5. *Id.*

6. *See* Debra Burke, *Beyond Bookstore Protests: Conservatives Fight to Expand Definition of Child Porn,* 84 A.B.A. J. 22, 22 (July 1998). Burke writes that the first book, containing nude pictures of children and adolescents on nudist beaches in Northern California and Europe, was produced with the written consent of the families of the models, and gives them ongoing control over the pictures. *See id.* at 24. The second book, Burke states, has photos of nude children accompanied by poetry and literary passages. *See id.*

phy on the Internet have incensed a group of advocates into fighting for the destruction of pornography.[7] Even images created on a computer not involving an actual child, similar to a drawing or painting, fall within the bounds of the CPPA.[8]

So far, two challenges to the CPPA have been brought, resulting in diametrically opposite dispositions. In the first case, *Free Speech Coalition v. Reno*,[9] the Northern District of California upheld the constitutionality of the CPPA. In the second (the subject of this Note), *United States v. Hilton*,[10] the District Court of Maine held that the statute suffered from vagueness and overbreadth. Although the court in *Hilton* correctly held the CPPA unconstitutional, its First Amendment analysis is flawed. Anti-pornography proponents need not draft a new statute; existing law suffices to regulate virtual child pornography.[11] The CPPA is not only unconstitutional, but also unnecessary.

I. BACKGROUND

A. *United States v. Hilton*

In *United States v. Hilton*, the defendant moved to dismiss charges filed against him for possession of child pornography in violation of section 2252A(a)(5)(B) of the CPPA.[12] Under this section, a person may not knowingly possess a book, magazine, periodical, film, video, computer disk, or any other material that has three or more images of child pornography that has been transported, or has been produced using materials that have been transported.[13] The material cannot have been transported in either interstate or foreign commerce by any means, including by computer.[14] The statute, in subsection 2256(8)(B), defines "child pornogra-

7. *See 12 Countries Target Web Pornography*, AP Online, Sept. 2, 1998, *available in* 1998 WL 6716909. A five-month investigation of the Wonderland Club, which has members on three continents, led to the arrests of over one hundred suspects. *See id.* Police found a database including over 100,000 pornographic pictures of naked children. *See id.* The club is a child pornography ring that exchanged pornographic pictures of children as young as two-years-old on the Internet. *See id.*

8. 18 U.S.C. § 2252A(b) (1998).

9. 1997 WL 487758 (N.D. Cal. Aug. 12, 1997).

10. 999 F. Supp. 131 (D. Me. 1998).

11. This Note addresses only completely virtual pictures that involve neither an altered image of an identifiable minor (such as a picture from a children's clothing catalog) nor the actual participation of a real child.

12. *See Hilton*, 999 F. Supp. at 132.

13. *See id.* (citing 18 U.S.C. § 2252A(a)(5)(B)).

14. *See id.*

phy" as any visual depiction, such as a picture, photograph, video, film, computer, or computer-generated image (made by any means), of sexually explicit conduct,[15] where the visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct.[16]

In discussing the constitutionality of the statute, the defendant argued that (1) the statute prohibits constitutionally protected speech by banning adult pornography; and (2) the language forbidding images that appear to be of minors engaging in sexually explicit activity is vague and overbroad, thus violating the First Amendment.[17] The court found only the second argument to be meritorious.[18]

1. Prohibition of Constitutionally Protected Speech

In determining that section 2252A(a)(5)(B) did not violate the First Amendment, the district court discussed the three requirements that legislation must meet to be considered constitutional: (1) the restrictions must be appropriate without reference to the content of the regulated speech; (2) they must be narrowly tailored to serve an important government interest; and (3) they must leave open sufficient alternate channels of communication for the information.[19]

a) Content Neutrality

In ascertaining the government's purpose in regulating images that appear to be of children engaged in sexually explicit activities, the court concluded that the government wanted to address the injurious secondary effects caused by the exchange and availability of such materials rather than stifle the individual ideas contained within the materials.[20] Although the defendant argued that the governmental interest should be limited to protecting children by preventing depictions of actual children, the court held that the harmful effects that justify the regulation of virtual child pornography "will be identical to those of pornography depicting actual children, with the exception of the harm resulting from the personal involvement in the production of the pornography."[21]

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15. *See* 18 U.S.C. § 2256(2) (defining "sexually explicit conduct" to include actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, and lascivious exhibition of the genitals or pubic area).

16. *See* U.S. v. Hilton, 999 F. Supp. 131, 132-33 (D. Me. 1998).

17. *See id.* at 133.

18. *See id.*

19. *See id.*

20. *See id.* at 134.

21. *Id.*

Moreover, the court found that when a sexually explicit image is "virtually indistinguishable" from that of a child, the depiction will have a tendency to stimulate pedophiles, assist sexual abusers of children to lure children into sexual activity, and stimulate the market for child pornography.[22] Therefore, the court concluded that the government intended to address the secondary effects of the protected speech rather than suppress the speech itself.[23]

b) Narrowly Tailored

To address whether the restriction is narrowly tailored, the court began by emphasizing the government's strong interest in the prevention of the harms caused by child pornography.[24] The court discussed how the government advances this interest through the statute, which limits its scope to the possession and distribution of visual depictions that are, or appear to be, of children engaged in sexual activity.[25] The court concluded that the statute is narrowly tailored to advance the objective of preventing the sexual abuse and exploitation of children.[26]

c) Sufficient Alternative Means of Communication

The court, moreover, found that alternative channels of communication exist to distribute protected speech. First, the court held that the statute does not prohibit possession of all visual depictions appearing to be children, only those that appear to be depictions of children engaging in sexually explicit conduct.[27] Second, the court indicated that the statute has an affirmative defense that permits free distribution of adult pornography provided that the distributor does not market it as depicting children engaged in sexually explicit activity.[28] On the basis of these two assertions, the court held that the statute permits "ample alternative means of communication."[29]

22. *See* U.S. v. Hilton, 999 F. Supp. 131, 134 (D. Me. 1998).
23. *See id.*
24. *See id.* at 135.
25. *See id.*
26. *See id.*
27. *See id.*
28. *See Hilton*, 999 F. Supp. at 135.
29. *Id.*

2. Vagueness and Overbreadth

The court found that the language of section 2256(8)(B) is unconstitutionally vague.[30] The statutory language, the court held, fails to sufficiently clarify the conduct that it prohibits.[31] First, the CPPA's definition of "child pornography" creates great uncertainty for viewers of materials of post-pubescent individuals because determining whether those persons are over eighteen years of age is often difficult.[32] Additionally, viewers will have a difficult time classifying computer-generated images according to this subjective model.[33]

The court held that the definition of "child pornography" in the statute included within its proscriptions significant protected expression.[34] The court decided that the statute affects a substantial amount of adult pornography that features adults who appear youthful.[35] Further, the court held that the expression involving youthful-looking adults would be chilled in light of the statute's criminal penalties, thus concluding that the statute is unconstitutionally overbroad.[36]

B. The CPPA

To be considered pornographic before the passage of the CPPA, a work had to depict an actual child (under the age of eighteen) engaging in actual or simulated "sexually explicit conduct."[37] The CPPA expanded the definition of child pornography to encompass both entirely virtual child pornography and computer-generated child pornography involving an "identifiable minor."[38] Under subsection 2252A(b), the definition of child pornography includes visual depictions of what "appears to be" minors engaging in sexually explicit conduct, thus including child pornography

30. *See id.* at 136. In an attempt to interpret the statute to be consistent with the Constitution, the court tried to apply the doctrine of *ejusdem generis*. After determining that the root of the problem is the term "minor" in the definition of "child pornography," the Court narrowly construed the term "minor" to mean "child." Because the visual depiction of a prepubescent person is less subjective, the prohibited conduct would be more certain. This solution failed, however, because sexually explicit depictions of post-pubescent individuals under age eighteen would not be prohibited and the term "identifiable minor," used in subsection 2256(8)(C), would create uncertainty. *See id.* at 136 n.6.

31. *See Hilton*, 999 F. Supp. at 136.

32. *See id.*

33. *See id.*

34. *See id.* at 137.

35. *See id.*

36. *See id.*

37. 18 U.S.C. § 2252A (1998).

38. 18 U.S.C. § 2256(8) (1998).

produced solely by computer that depicts no real child.[39] Subsection 2252A(c) broadens the definition of child pornography to include depictions of an "identifiable minor," defined by Congress as one "who was a minor at the time a visual depiction was created, adapted, or modified or whose image as a minor was used in creating, adapting, or modifying the visual depiction...."[40] This includes superimposing the face of an actual child on the body of an adult that was engaged in sexually explicit conduct. Lastly, subsection 2252A(d) expands the definition of child pornography to include sexual depictions that are presented in a manner to make an observer believe that they depict minors engaged in sexually explicit conduct.[41]

In addition, the CPPA creates an affirmative defense that exempts alleged child pornography using adults that is not promoted as visually depicting minors engaged in sexually explicit conduct.[42] The defense, however, does not apply to the *possession* of child pornography.

C. Legislative and Judicial History

In order to determine what child pornography is, this Note will examine the history of how Congress and the courts have defined it. Although the courts and Congress have generally been consistent in creating restrictions on child pornography, Congress has taken a large leap beyond the courts in its most recent amendment of the CPPA.

Congress first enacted the Sexual Exploitation of Children Act in 1977.[43] Five years later, in *New York v. Ferber*,[44] the Supreme Court found that a state may criminalize the distribution of child pornography produced by using actual children.[45] In determining that a state has more leeway to restrict child pornography than it does adult pornography, the Court found (1) that the state has a compelling interest in protecting the interests of children; (2) that distribution of child pornography is directly related to the sexual abuse of children because it both serves as a record of the sexual abuse and it encourages the production of the materials; (3) that selling child pornography provides economic encouragement for produc-

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39. *See* 18 U.S.C. § 2252A(b) (1998).

40. *Id.*; 18 U.S.C. § 2256(9) (1998).

41. *See* 18 U.S.C. § 2256 (9) (1998).

42. *See* 18 U.S.C. § 2252A(c) (1998).

43. Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-53 (1991 & Supp. 1996)).

44. 458 U.S. 747 (1982).

45. *See id.* at 751-52 (1982) (upholding the conviction of adult bookstore owner found guilty under a New York statute for selling films depicting young boys masturbating).

tion of the materials; (4) that child pornography has minimal, if any literary, scientific, or educational value; and (5) that grouping child pornography as apart from First Amendment protection is not inconsistent with precedent.[46] The Court held that child pornography is not covered by the First Amendment for these policy reasons and that it does not have to be found obscene to be prohibited.[47]

However, the Court required that child pornography statutes must apply only to visual works of children below a definite age, must adequately state what content is prohibited, and must have a scienter requirement.[48] Additionally, the Court found that any overbreadth of the statute that could prohibit some protected speech should be corrected on a case-by-case basis.[49] Interestingly, the Court also suggested that, if necessary for literary or scientific value, an individual may employ alternatives to using an actual child and may produce simulated child pornography.[50] To do so, the individual could use a person over the statutory age that appears to be younger or a "simulation outside the prohibition of the statute."[51]

In response to the Act's limited usefulness and the Supreme Court's decision in *Ferber*, Congress passed the Child Protection Act of 1984.[52] This Act eliminated the *Miller*[53] requirement that the material be obscene, replaced the phrase visual or print medium with the phrase "visual depiction," and redefined sexual conduct by substituting the term "lascivious" for "lewd" to emphasize that the depiction did not have to be obscene to be illegal.[54]

In the 1990 case, *Osborne v. Ohio*,[55] the Court held that child pornography should receive less First Amendment protection than obscenity, upholding a state law proscribing the possession and viewing of child por-

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46. *See id.* at 756-64.
47. *See id.* at 764-65.
48. *See id.*
49. *See id.* at 773-74.
50. *See Ferber,* 458 U.S. at 762-63.
51. *Id.*
52. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2252(b), 2253, 2254 (1991 & Supp. 1996)).
53. Miller v. California, 413 U.S. 15, 24 (1973) (establishing guidelines for the trier of fact to determine whether material is obscene: (1) whether the "average person, applying contemporary community standards" would find that the work as a whole appeals to the "prurient interest"; (2) whether the work depicts or describes in a "patently offensive" way, sexual conduct specifically defined the applicable state law; and (3) whether the work as a whole lacks serious literary, artistic, political, or scientific value).
54. Pub. L. No. 98-292, 98 Stat. 204 (1984); *see also* Burke, *supra* note 6, at 450.
55. 495 U.S. 103 (1990).

nography.[56] In upholding the statute, the Court explained that prohibiting the possession of child pornography would (1) reduce the demand for child pornography, and consequently, the supply; (2) encourage the destruction of child pornography; and (3) reduce the probability of a pedophile using the materials to "seduce" other children.[57]

The Court in this case went one step beyond *Ferber*, justifying a ban on production and distribution not solely based on the harm to the actual children exploited in the creation of materials, but also in the harm inflicted on the victims by pedophiles who use the materials to seduce them.[58] However, similar to *Ferber*, the Court held that the statute was not overbroad and that a scienter requirement of recklessness was necessary.[59]

Since computer networks began to facilitate the child pornography business, Congress passed the Child Protection and Obscenity Act of 1988.[60] This Act made it illegal to use a computer to send or receive child pornography, criminalized the possession of three or more pieces of child pornography, and imposed record keeping and disclosure requirements on the producers of specified sexually explicit materials.[61] Then, evidently in response to *Osborne*, Congress added this possession element in 1990.[62]

In *United States v. X-Citement Video*,[63] the Supreme Court found that, under the Child Protection and Obscenity Act, the government needed to prove that the defendant knew that a performer in child pornography was a real minor.[64] Even though the statute had no scienter requirement, the

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56. *See id.* at 108-10.

57. *See id.* at 109-11.

58. *See* Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996*, 35 HARV. J. ON LEGIS. 245, 254 (1998).

59. *See Osborne*, 495 U.S. at 113 (holding that the Ohio Supreme Court's interpretation cured the statute's facial overbreadth because it applied only where a child is in a state of nudity and such nudity constituted "a lewd exhibition or involves a graphic focus on the genitals").

60. Pub. L. No. 100-690, § 7501, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. § 2252 (1991 & Supp. 1996)).

61. *See* Pub. L. No. 100-690, § 7501, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. § 2252 (1991 & Supp. 1996)); *see also* Burke, *supra*, note 6, at 451.

62. *See* Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 311, 104 Stat. 4815, 4815-17 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4) (Supp. 1996)).

63. 513 U.S. 64 (1994) (affirming conviction of video store salesperson who sold pornographic videos featuring an actress who was a minor).

64. Some have argued that the Court should have considered a scienter level of recklessness. *See, e.g.*, Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. § 2252*,

Court read the statute to require that the government prove that the defendant knew that the child was a minor because (1) if there were no scienter requirement, the statute would punish both distributors that did not know that the film contained an underage actor and distributors that did not know that the film was pornographic; (2) the Court generally interprets criminal statutes to include a scienter requirement even if they do not contain one; (3) the legislative history does not preclude the interpretation; and (4) cases such as this suggest that a child pornography statute that is silent regarding a scienter requirement as to age would probably be unconstitutional.[65] Thus, the Court's reinterpretation of the statute enabled it to avoid the constitutionality inquiry altogether.

In 1994, the statute was amended to punish the production or importation of sexually explicit depictions of a minor.[66] Lastly, in 1996, Congress amended the CPPA to include even mere possession of computer-generated or virtual child pornography.[67]

II. DISCUSSION

Virtual child pornography is not the same thing as real child pornography because no actual child is harmed in its production. The CPPA sweeps too broadly.[68] By establishing an irrebuttable presumption that an image is real,[69] the CPPA has a chilling effect on virtual child pornography, which should be considered constitutionally protected speech.

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86 J. CRIM. L. & CRIMINOLOGY 1341, 1342 (1996) ("The majority assumed that the statute required knowledge as the applicable level of scienter....The majority should have considered recklessness as an applicable scienter level."); Robert F. Schwartz, *Federal Child Pornography Law's Scienter Requirement—United States v. X-Citement Video, Inc.*, 28 HARV. C.R.-C.L. L. REV. 585, 586 (1993) ("Congress should amend the statute to include a recklessness requirement.").

65. *See X-Citement Video,* 513 U.S. at 68-78.

66. *See* Child Sexual Abuse Prevention Act of 1994, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to 3009-31 (1996) (codified at 18 U.S.C. §§ 2252A, 2256 (1998)).

67. *See* 18 U.S.C. § 2252A (1998).

68. *See* John Schwartz, *New Law on 'Virtual' Child Porn is Criticized*, SEATTLE TIMES, Oct. 6, 1996, at A24. Referring to the CPPA, the legislative counsel for the ACLU, Daniel Katz stated, "[W]hat they're going to do is sweep up a great deal of constitutionally protected activity." *Id.* The CPPA, other critics note, will allow prosecution of legitimate works such as the movie *KIDS,* and will have a chilling effect on future films, such as new productions of *Lolita. See id.*

69. *See* U.S. v. Hilton, 999 F. Supp. 131, 137 (D. Me. 1998).

A. While the *Hilton* Court Correctly Found the Statute Unconstitutional for Vagueness and Overbreadth, Its First Amendment Analysis Is Flawed

Although the court rightly found that the CPPA is unconstitutional for vagueness and overbreadth, its first avenue of inquiry should have been sufficient to find the statute unconstitutional because the regulation is not narrowly tailored to achieve a compelling state interest. After determining that the CPPA's restrictions were content-neutral,[70] the court explained that the secondary effects that accompany the viewing of virtual child pornography justify the use of the CPPA.[71] But the secondary effects of child pornography are too speculative to justify a ban that will effectively restrict constitutionally protected speech. Additionally, the CPPA is not narrowly tailored and fails to leave open sufficient alternative means of communication.

The connection between the viewing of virtual child pornography and causing harm to an actual child is too speculative, although the link between molestation and the viewing of pornography is highly contested.[72] The secondary effects doctrine parallels an argument presented by Catherine MacKinnon that the viewing of pornography causes men to rape women.[73] No statute currently uses her argument to justify the regulation of pornography.[74]

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70. Determining whether the CPPA's restrictions are content-based or content-neutral is beyond the scope of this Note. For a persuasive argument that the CPPA's restrictions are content-based rather than content-neutral, see Gary Geating, Note, *Free Speech Coalition v. Reno*, 13 BERKELEY TECH. L.J. 389, 398-400 (1998).

71. *See Hilton*, 999 F. Supp. at 134.

72. *See, e.g.*, David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55 (1997); Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L L. 541, 541-46 (1998); Samantha L. Friel, Note, *Porn By Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U. L. REV. 207, 246-57 (1997).

73. *See, e.g.*, Catharine A. MacKinnon, *Commentary, Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 43-69 (1985).

74. Two states, Minnesota and Indiana, have failed to adopt statutes using MacKinnon-style arguments. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (1985), *aff'd*, 475 U.S. 1001 (1986) (holding unconstitutional an ordinance, based on MacKinnon's argument, that defines "pornography" as "the graphic sexually explicit subordination of women"); Edward A. Carr, Comment, *Feminism, Pornography, and the First Amendment: An Obscenity-based Analysis of Proposed Anti-Pornography Laws*, 34 UCLA L. REV. 1265, 1267 n.10 (1987) (citing Minneapolis, Minn., Ordinance Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances Relating to Civil Rights: In General (Dec. 30, 1983)). Two anti-pornography ordinances declaring pornography a

In describing the harmful secondary effects of viewing child pornography, the court pointed to the congressional findings discussed in *Osborne v. Ohio,*[75] stating that "child pornography is often used by pedophiles and sexual abusers to stimulate and whet their own sexual appetites."[76] Thankfully, there is no law that criminalizes the stimulation or whetting of a citizen's sexual appetite. Regardless of whether the sexual appetite stimulated is one that society classifies as "normal" or "deviant," the act of stimulating the sexual appetite causes no harm unless acted upon unlawfully.

Additionally, the congressional findings, relied on by the court as evidence of the secondary effects of viewing child pornography, affirm that "child pornography is often used as part of a method of seducing children into sexual activity."[77] Punishing the potential to commit a crime is punishing thought rather than action. This rationale is similar to prohibiting the sale of chemistry books because someone may use the equations of the books to create bombs.

The crime of using child pornography as a means to seduce should be differentiated from the act of viewing virtual child pornography, otherwise the CPPA is punishing pedophiles before they actually commit a crime—namely, those who view virtual child pornography, fantasize about it, but never harm a real child.[78] In *Osborne*, Justice Brennan pointed out that adult pornography could also aid a pedophile in the seduction of children.[79] However, the Court has refused to prohibit adult pornography based on similar arguments.[80] Before the anxiety surrounding *Lolita* and JonBenet Ramsey, the Court in *Ferber*—stressing the strong government interest in protecting actual children from sexual exploitation—suggested doing exactly what the CPPA prevents; that is, using young-looking adults

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violation of a woman's civil rights were vetoed by Minneapolis Mayor Don Fraser. *See also* Lee Siegel, *Censorship Foes Warn Sex Researchers of Anti-Pornography Efforts*, THE ASSOCIATED PRESS, Sept. 21, 1985, *available in* 1985 WL 2876267.

75. 495 U.S. 103, 109-10.

76. *Hilton*, 999 F. Supp. at 134 n.3 (1990) (citing Pub.L. No. 104-208, § 121(1)(4), 110 Stat. 3009 (1996)).

77. *Id.* (citing Pub. L. No. 104-208, § 121(1)(3), 110 Stat. 3009-26 (1996)).

78. *See generally* Alan Dershowitz, *Commentary, Don't Criminalize 'Virtual Reality,'* L.A. TIMES, June 6, 1996, at B7. ("[T]he vast majority of people who get their jollies from watching kids have sex do not engage in sex with children.").

79. *See* Osborne v. Ohio, 495 U.S. 103, 145 (1990) ("The Attorney General's Commission, however, determined that pedophiles are likely to use adult as well as child pornography to lower the inhibitions of a child victim.").

80. *See id.* ("Thus, while acts of sexual abuse themselves may be outlawed, the private possession of photographs, magazines, and other materials may not.").

or simulations as constitutionally-protected alternatives to the use of real children.[81]

Thus, the statute is not narrowly tailored because it would be less restrictive to punish the actual crime of using virtual child pornography to seduce a victim, rather than punishing all viewers of the pornography. The requirement that a regulation be "narrowly tailored" means that the interest cannot be equally well served by a means that is substantively less intrusive on First Amendment interests.[82] The use of virtual child pornography to seduce children should be punished as a separate offense, rather than punishing all possessors of virtual pornography as potential seducers.

Although the court held that the CPPA leaves open alternative means of communication,[83] the CPPA fails to do so. A content-neutral regulation must "leave open alternative channels for communication of the information."[84] In this case, however, the regulation forecloses all communication of a certain type. The CPPA restricts not merely the means of communication, but the form. The ability to say something *else* as opposed to the *same* speech in an alternative forum does not satisfy the "alternative means" requirement.[85]

B. The Technology Leading to the CPPA

The use of technological advances to facilitate the creation of child pornography troubled Congress.[86] Technology changed the manner in which pornography could be created, distributed, and accessed. Prior to

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81. *See* New York v. Ferber, 458 U.S. 747, 763 (1982).

82. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (holding that narrow tailoring requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests").

83. This inquiry is relevant because the court claimed that the regulation was content-neutral, rather than content-based. *See supra* note 70 and accompanying text.

84. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

85. *See* Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[The] government may not prohibit others from assembling or speaking on the basis of what they intend to say."); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.54 (2d ed. 1992) ("[A] time, place, or manner regulation must leave open ample alternative channels of communication so that the regulation does not effectively stifle the ability of those who would express the message to bring that message to the attention of the citizenry." (citation omitted)).

86. *See* Child Pornography Prevention Act of 1995, Hearing, Committee on the Judiciary, Senate, 97 CIS 52181 (1996) (including an analysis of Supreme Court decisions involving state laws to combat child pornography, perspectives on psychological harm to children caused by use of computer-generated images of children appearing to engage in sexually explicit conduct, and the role of pornography in promoting the sexual abuse of children).

the invention of the Internet, consumers and distributors of child pornography had to know each other or have connections to exchange materials. Underground networks facilitated the trade of photographs or videos through the mail or in person.[87] Currently, however, subscribers to bulletin boards can simply download graphic images through their modems to be able to view and print images.[88]

The anonymity available on the Internet hinders the detection of child pornography. A user can create any identity and transmit a message from California, through New Zealand, and then to Arkansas, making it impossible to determine the origin.[89] Furthermore, "anonymous remailers" enable a user to re-route outgoing messages by removing the source address, assigning an anonymous identification code number with the remailer's address, and forwarding it to the final destination.[90] Replies are likewise encoded, so the responder also remains anonymous. Encryption techniques further reduce the chances of detection. Through the use of a mathematical function and a key, encryption prevents those who do not have the key from accessing the files.[91]

Producing visual depictions has also become easier with time. Photographs can be input into a computer through scanners, which convert images into digital form that the user can save on a hard disk. For as little as $100, hand-held scanners can provide adequate resolution, detail, and quality of images. Additionally, peripherals, such as a video camera device, can record both color video and sound from a VCR directly into the computer.[92] Further, the quality of images does not deteriorate as rapidly with time or reproduction as photographs do because the images are in digital form.[93]

Congress passed the CPPA specifically to address the technology that enables alteration of pictures of adults and children and the creation of computer-generated images.[94] The virtual images, called "morphs," are

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87. *See* Attorney Gen. Comm'n on Pornography, Final Report (Meese Commission Report) (1986), U.S. Dept. of Justice 215, *reprinted in* Final Report of the Attorney General's Commission on Pornography 67 (1986).

88. *See* United States v. Kimbrough, 69 F.3d 723, 726 (5th Cir. 1995).

89. *See* Margaret A. Healy, *Child pornography: An International Perspective,* at § IV (visited Oct. 10, 1998) <http://193.135.156.14/webpub/csechome/215e.htm>.

90. *See id.*

91. *See* James Daly & Gary H. Anthes, *Internet Users Batten Down Hatches: Security Measures Are on More Users' Minds,* COMPUTERWORLD, Feb. 21, 1994, at 50.

92. *See generally* Healy, *supra* note 89.

93. *See id.*

94. *See* Pub. L. No. 104-208, § 121(1), (5), (6), 100 Stat. 3009, 3009-26, (1996) (noting that computer-imaging makes possible the (1) altering of sexually explicit pic-

often impossible to distinguish from pictures of real children.[95] Graphics software packages costing under $500 enable users to create images and manipulate scanned images after reducing a photograph to binary form.[96] Moreover, computer animators can create three-dimensional images through specialized computers that have been designed to create animated images.[97] Such computer-generated animation has been used in movies like *Robocop 2* and *Total Recall*.[98] One method of creating computer-generated humans is by using clay to make a model and then digitizing the models, similar to *Gumby* cartoons.[99] Another technique involves digitizing images of humans and then using a computer to manipulate the images, matching the motions of a human that have been tracked and recorded by the computer.[100] Interestingly, these computer-generated images resemble—if are not by definition—artistic expression. Like art, virtual images are given life only by the imagination of their creators.

C. The Standard Articulated by the Court in *Miller* Provides Sufficient Protection in the Distribution of Virtual Child Pornography

The Court's decision in *Miller* provides a reasonable way for the government to deal with the distribution of virtual pornography.[101] *Miller* established guidelines for the trier of fact to use in determining whether ma-

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tures to make it appear that children are engaged in sexual activity; (2) producing visual depictions of children engaged in sexual activity to satisfy the preferences of pedophiles; and (3) altering innocent pictures of children to make it appear that children were engaging in sexual activity).

95. *See* Joseph N. Campolo, Note, *Childporn.Gif: Establishing Liability for On-line Service Providers*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721, 735-37 (1996); Jason Wolfe, *Local Judge Rules Against Internet Child-Porn law, The Federal Law is Too Broad, Says U.S. District Court Judge Gene Carter, Dismissing Charges Against a Norway Man*, PORTLAND PRESS HERALD, Apr. 2, 1998, at A1.

96. *See* Campolo, *supra* note 95, at 735-36; James R. Norman, *Lights, Cameras, Chips!*, FORBES, Oct. 26, 1992, at 260.

97. *See* Norman, *supra* note 96, at 260.

98. *See* Kathleen K. Wiegner & Julie Schlax, *But Can She Act?*, FORBES, Dec. 10, 1990, at 274.

99. *See id.*

100. *See id.*

101. Miller v. California, 413 U.S. 15; *see also* David J. Loundy, *Who Hasn't Noticed? Child Porn Already Illegal*, CHI. DAILY LAW BULLETIN, May 14, 1998, at 6. *But see* David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 328 (1994) ("[P]rohibiting the possession of computer-generated child pornography will prevent sex crimes on children.").

terial is obscene.[102] Virtual child pornography is not real child pornography.[103] However, an explosion in the distribution of virtual pornography would make finding the real instances of child abuse among the sea of virtual images difficult, if not impossible. Advocates of the CPPA predict that under such circumstances, law enforcement officials will be unable to find the real cases of child exploitation.[104] Still, using the CPPA to control the proliferation of virtual pornography seems too harsh.

Two advantages stem from using the *Miller* test in regulating virtual child pornography over the tests used in *Osborne* or statutes akin to the CPPA. First, the potential explosion of virtual child pornography would not be a threat because the *Miller* standard would allow prosecution of truly "obscene" pictures. Second, the government would have to convince a trier of fact that the work is legally obscene.[105]

The obscenity standard used in *Miller v. California*[106] would suffice to regulate distribution of virtual child pornography. The obscenity standard already ensures that obscene pictures of child pornography (virtual or real) cannot be *legally* shown on the Internet.[107] Although the use of the obscenity test has problems because of its inherent subjectivity and uncertainty, no reason exists to extend regulation beyond the *Miller* test to allow a statute like the CPPA to restrict speech.

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102. *See Miller*, 413 U.S. 15, 24 (discussing the standard).

103. The Child Sexual Abuse Prevention Act of 1994 already addressees the problem of real child pornography. *See supra* note 66 and accompanying text.

104. *See* Wasserman, *supra* note 58, at 269-71.

105. *See Miller*, 413 U.S. at 24-25; *see also supra* note 53 (discussing the standard).

106. *See Miller*, 413 U.S. at 24-25; *see also* Sean J. Petrie, Note, *Indecent Proposals: How Each Branch of the Federal Government Overstepped Its Institutional Authority in the Development of Internet Obscenity Law*, 49 STAN. L. REV. 637 (1997) (discussing the development of Internet obscenity law, offering a normative model for the process, and arguing that Congress and the Federal Communications Commission are the appropriate institutions to make regulations that apply existing laws to unique technologies and that when regulations involve new restrictions on speech, Congress and the FCC should narrowly tailor laws to conform with established First Amendment jurisprudence).

107. *See* Mike Godwin, *Children, Child Abuse, and Cyberporn: A Primer for Clear Thinkers* (visited Oct. 11, 1998) <http://www.eff.org/pub/Publications/Mike_Godwin/kids_and_cyberporn_godwin.article> ("[C]omputer-generated material that seems to depict children engaged in sexual activity but in the manufacture of which no child was used would not be child porn, although it almost certainly would be obscene in every community in this country."). However, the use of an obscenity standard has its problems. *See, e.g.*, Dennis W. Chiu, *Comment, Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185 (1995) (discussing the difficulty in assessing community standards and definitions for obscenity, examining modern advances in communications, and suggesting possible solutions, including a national standard for determining obscenity).

Further, if the government must present its case to a fact finder, the propriety of the images will be a question of fact, rather than one of law, giving greater constitutional protection to the speech.[108] The *Miller* standard is better suited to address the distribution of virtual child pornography than is the *Ferber* test. The *Ferber* court explained that the harm caused to the child in production of child pornography gives sufficient reason for it to have an unprotected speech status.[109] But there is no harm to a real child in the creation of virtual child pornography. Moreover, the Court in *Ferber* also found that child pornography does not include drawings, sculptures, or written accounts of sex with children.[110] A computer-generated image certainly seems much more like a drawing or sculpture than a picture that captures live conduct with a real victim.

D. The Courts Should Allow an Affirmative Defense for the Possession of Virtual Child Pornography

The *Miller* standard is insufficient to deal with the main problem that technological advances pose—the difficulty of distinguishing real and virtual pornography for law enforcement purposes. The problem with the *Miller* test is that possession of virtual child pornography would not be a crime.[111] In *Stanley v. Georgia*,[112] the Court held that private possession of obscenity cannot be prohibited because the government may not control the moral content of a person's thoughts.[113]

However, using *Osborne* for guidance seems too encompassing. In *Osborne*, the Court held that possession of child pornography could be criminalized, regardless of whether it was "obscene," in order to prevent the exploitation of children through pornography.[114] Again, virtual child pornography does not involve the use of an actual child, so the standard articulated in *Osborne* does not apply.

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108. *See* Chiu, *supra* note 107 (discussing the problems of using community standards in determining obscenity on the Internet).

109. *See* New York v. Ferber, 458 U.S. 747, 764 (1982).

110. *See id.* at 762-63. Therefore, the regulations were limited to works that visually depict conduct by minors. The Court also stated that non-obscene depictions of sexual conduct that do not involve live performance or photographic or visual reproduction of live performances retain First Amendment protection. *See id.* at 764.

111. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime").

112. 394 U.S. 557.

113. *See id.* at 566-68.

114. *See* Osborne v. Ohio, 495 U.S. 103, 110 (1990).

Given the difficulty in distinguishing images, however, an acceptable way of regulating virtual child pornography would be to create an affirmative defense for the possession of virtual pornography.[115] While it is true that child molesters are often convicted on the basis of the pictures that they possess,[116] viewers of virtual child pornography will not necessarily ever commit crimes against real children.[117] Allowing people who possess virtual pornography an affirmative defense would address law enforcement concerns while at the same time protecting a viewer's constitutional rights.

III. CONCLUSION

The court came to the right result in *United States v. Hilton*, although its First Amendment analysis is flawed. However, the CPPA need not be redrafted to address the issue of virtual child pornography. By using the *Miller* standard to regulate the distribution of virtual child pornography and allowing possessors of virtual pornography an affirmative defense, the courts can respect both the constitutional rights of viewers of virtual pornography as well as law enforcement needs. Although child pornography poses a serious dilemma, a frenzied effort to protect children from a *potential* threat by eliminating virtual pornography endangers the Internet more than virtual pornography ever could.

115. *See* Friel, *supra* note 72, at 258-67.

116. *See 12 Countries Target Web Pornography*, *supra* note 7 and accompanying text.

117. *See* Dershowitz, *supra* note 78, at B7.